IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO: D 781/06

In the matter between

DAVID JONATHAN SAMUELS **APPLICANT**

And

COMMSSION FOR CONCILIATION, MEDIATION AND ARBITRATION **FIRST RESPONDENT**

BESS PILLEMER **SECOND RESPONDENT**

RUSSELLS FURNISHERS (A DIVISION OF JDG TRADING (PTY) LTD) **THIRD RESPONDENT**

JUDGMENT 10 JULY 2008

CELE AJ The case before me is an application for the review, setting aside and substitution of an application dated 18 October 2006 which the second respondent issued as a Commissioner of the first respondent.

The reliance has to be placed on section 145 of the Labour Relations Act 66 of 1995, hereafter referred to as the Act for the application.

The third respondent opposed the application in its capacity as the erstwhile employer of the applicant.

The applicant commenced his employment with the third respondent, who I will refer to as the employer or Russells or the company on 15 October 1996. He was then deployed at the Chatsworth store of the company in the position of a business manager.

On 1 July 2005 he attended a work related course in Johannesburg,

but whilst he was on the course, he was served through a telefax with a letter or with the suspension papers. The suspension emanated from a grievance filed against him by about eleven or twelve staff members of his branch in Chatsworth. Before he was suspended, he had not been invited to comment on such a grievance.

What then followed was that he consulted with a doctor who referred him to another and he was then put on sick leave because of the stress related condition that he was going through which, according to him, emanated from the events that unfolded.

Even at that early stage he began to challenge his suspension because he felt that the company or the employer had not followed its own policy or procedure in suspending him.

On 2 October there was an incapacity hearing. He was given a notice of incapacity consultation and thereafter the second hearing is the one that was held on 13 December, that is, the second incapacity consultation took place on 13 December 2005. It was as a result of that hearing that he was then dismissed. He was aggrieved by the dismissal and he referred an unfair dismissal dispute for conciliation and thereafter for arbitration.

The second respondent was appointed as the Arbitrator in this matter, she having looked at the evidence that was led by the parties, issued an award which I will refer to, but the award was in favour of the third respondent.

She referred to case law which guided her and she said the following, which I want to quickly refer to.

"Applying these tests to the current facts what is clear is

that the Applicant's incapacity was of a recurrent nature. The recurrence was frequent to the extent that it continued over a period of some six months. The effect was serious on the operations of the Chatsworth branch of the Respondent. The Applicant occupied a senior position. The Applicant was off for some 159 days in the context where, whatever the rights and wrongs of the grievance may have been, there was clearly a serious problem between him and a significant body of the staff at the store that had to be dealt with and resolved.

In my view, frequent and erratic periods of absence from work can be in themselves sufficient for an employer like the Respondent to terminate the employment of the employee suffering ill health. It clearly does not do this easily. The time and effort spent in trying to set up a hearing demonstrates that it was attempting to deal with the matter properly and fully. Its attempts were frustrated both because of the Applicant's ill health and also by his decision not to participate until his own grievance had been resolved first. Working together with the combination of his ill health and attitude to his employer can in my assessment justifiably lead to a finding that the

> employment relationship is just not working and that this is due to the Applicant's lack of capacity to do what is required of him by his employer. It is in this context I have to assess whether the decision to dismiss was reasonable. It does not have to be the decision I would have made in this situation or even the only reasonable decision. It merely has to be a reasonable response to the situation. If I cannot say that the Respondent's decision is unreasonable then, in accordance with the law set out in the recent Supreme Court of Appeal judgment in *Rustenburg Platinum Mines Limited v CCMA* 2006 (SCA) 115 RSA I cannot interfere with the employer's decision. For the reasons set out above I am not satisfied that the decision by the employer to terminate the employment contract was not reasonable and the result cannot therefore be interfered with and I uphold that decision".

I am aware that the Commissioner added further things in the award. What is clear is that from this judgment, whilst Mr *Bleazard* has suggested that she really did not defer to the decision of the employer, in my view indeed she did. She used this decision which was, of course, at that time the law which was applicable. It has subsequently been set aside. In my view this is no longer a test that should be used.

I am aware that there has been a different test that has been set which used to suffuse the provisions of section 145 emanating from the

decision in *Carephone (Pty) Ltd v Marcus NO and Another (1998) 19 ILJ 1425 (LAC).*

With the change from *Carephone* to the *Sidumo* decision, which is now being followed, there might be cases that come and parties prepare their papers under the *Carephone* decision, but in a review application, the applicable decision or applicable test if now the *Sidumo* decision, notwithstanding the fact at the time of the preparation of the papers or at the time of the award, the *Carephone* decision or test would have been followed.

Today I have to ask myself whether the decision reached by the Commissioner is the one that a reasonable decision-maker could not have reached. If I say yes, it is the one that a reasonable decision-maker could not have reached, I should review the award. If I say it falls within the range of reasonableness, it is one of those decisions that could have been reached by a reasonable decision-maker, I should then sustain it.

What worries me in this matter which favours me granting the application for review is firstly the Notice of Incapacity Consultation found on C.16 in the bundle of papers, it relates to the issues that would be dealt with at such incapacity as extended absence on leave and incapacity to perform according to a required standard or standards due to ill health or injury. That is the notice that was given to the applicant. If he had attended that hearing, he should have been prepared for only that, but the outcome of that hearing, as I see it on C.19 reads –

> "This consultation consisted of 2 categories of concern:-
>
> 1. Your inability to relate to your employer and to your fellow colleagues thereby rendering you

incompatible for a position as an employee of Russells.

2. Your absence from your place of work over an extended period of time, rendering you unable to fulfil your contractual obligations for which you were appointed".

The first one would have related to an inquiry which the company intended to hold against the applicant, it should not have, in my view, featured in this hearing. It is difficult to test how far the mind of the Commissioner was contaminated by this matter which, in my view, should not have featured.

If you look at the award itself, she continues to add and she looks at a combination of the two issues. As Mr *Bleazard* has suggested, perhaps if one were to look at severing the evidence to say that she could have been able to find dismissal to be appropriate without adding this aspect. In my view, I cannot so agree.

It must be remembered that a gross irregularity can easily be committed by a latent state of the mind. I cannot with a clear mind say that the decision she reached was not contaminated by this material which, in my view, ought not to have really featured. That is the first aspect.

The second aspect, of course, relates to the test that she used. Here she was called upon to apply her own mind. She was entitled to use her own reasoning to decide on the fairness or otherwise of the dismissal. In my view she deferred to the decision of the employer.

Thirdly, I bear in mind that on the second incapacity hearing it was

only the chairperson and the secretary present. It begins to make me wonder what material was collected on that day. There is no evidence that appears clearly to have been tendered pertaining to the issues as would have been the case with the hearing in October. There is a lack of such evidence and I entertain doubt that there was enough material for him to have come to the conclusion that the dismissal was appropriate on 13 December.

Of course I want to point out that unlike the approach adopted by the applicant, an employer may dismiss an employee after an incapacity hearing, notwithstanding the fact that the policies do not provide for that. The considerations are not limited to the policy. The policy is part of all other considerations that come to play, such as the law of the country. It would be the Labour Relations Act, it would be the Schedule, it would be all other considerations, the cases that are handed down by Judges. So whilst there may be no provision as to how a company should deal with an employee after an incapacity hearing, the limit should not be seen to be based only on the policy, as has been the case here.

You will see the number of cases that have been referred to, even by the applicant, support the holding of an incapacity hearing followed by a dismissal, depending on the circumstances.

When one looks at the circumstances, it is where then this short term incapacity, the medium term, the long term, come into play, they are part and parcel of the considerations that come to mind.

In my view, therefore, at the end of the day, the application for the review of the arbitration award dated 18 October 2006 in this matter,

succeeds.

However, as was intimated by the applicant in the second notice, I cannot agree with that. I think, in my view, there has not been a fair trial of some of the issues that are critical in this matter. I cannot be a proper person to finalise that. In my view this matter deserves to be reheard, therefore the order I will make will address that issue.

I have said firstly the award is reviewed and is set aside. Then secondly, the matter is now remitted to the first respondent for a *de novo* arbitration hearing before a Commissioner other than the second respondent.

The contribution made by Mr *Bleazard* or by the third respondent is not negligible, it has been very helpful in this matter. I cannot say that they need to be punished for coming here to defend that action, so there will be no costs order.

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Cele AJ

Date: 27 August 2008

APPEARANCES

For the Applicant: In person

For the Respondent: Mr B Bleazard-Brian Bleazard Attorneys

IN THE LABOUR COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

DURBAN

CASE NO D781/06

DATE 10/7/08

In the matter between

D J SAMUELS **APPLICANT**

and

CCMA AND OTHERS **RESPONDENTS**

BEFORE THE HONOURABLE MR JUSTICE CELE

ON BEHALF OF APPLICANT: MR D J SAMUELS

ON BEHALF OF THIRD RESPONDENT MR B BLAEZARD[?]

EXTRACT
Judgment Only